IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF:	)	No. 57507-4-I
	)	
	)	DIVISION ONE
JASON SUTTON,	)	
	)	UNPUBLISHED OPINION
Petitioner.	)	
	)	FILED: September 18, 2006

GROSSE, J. – The fact that a petitioner will be retried for a conviction that has been vacated is not sufficient to postpone his resentencing for other offenses even though the original sentence imposed utilized an offender score which included that vacated conviction. We remand for resentencing.

Jason Sutton is currently serving a sentence of 431[1] months for 1995 convictions in King County. In calculating the offender score, the trial court included Sutton's second degree murder conviction in Pierce County as a prior conviction. On September 16, 2005, that murder conviction was vacated pursuant to In re Personal Restraint Petition of Andress.[2] That same day, Pierce County refiled first degree murder charges against Sutton.

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[1] The sentence was originally 541 months. It was reduced for an error in the offender score in count IV by an order of this court in an unpublished opinion, case No. 36449-9-I, filed December 19, 1996. That order also upheld the awarding of an exceptional sentence of consecutive sentences on the trial court's finding that there was an abuse of trust.

[2] Andress, 147 Wn.2d 602, 56 P.3d 981 (2002)

On November 18, 2005, Sutton filed a motion for resentencing in King County under CrR 7.8(b). The State opposed the motion requesting that it either be denied or continued pending the outcome of Sutton's trial in Pierce County for murder in the first degree. The King Country Superior Court transferred the matter to this court as a personal restraint petition.

The State first argues that Sutton is time-barred from pursuing this personal restraint petition since the sentencing occurred more than one year ago. RCW 10.73.090(1) states: "No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction." However, a defendant may file a CrR 7.8 motion at any time if the judgment and sentence is facially invalid or if there has been a significant change in the law.[3]

The Andress decision which vacated the conviction that formed the basis of his offender score was a significant change in the law. Moreover, a judgment and sentence has been held to be invalid on its face where a petitioner's washed out juvenile convictions were considered in calculating an offender score in

[3] RCW 10.73.100(6) states:

> There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

(Emphasis added).

violation of former RCW 9.94A.030(12)(b).[4] Sutton is not barred from seeking relief from the invalid sentence even though filed more than one year after the sentence was final.

The State next argues that Sutton should not be resentenced until after Pierce County has had a chance to retry Sutton on the newly filed murder charges. The State argues that Sutton gets a "windfall" if he is resentenced in King County since the resentencing would not include the Pierce County conviction and thus he would receive a lower offender score. Sutton argues that it is questionable whether the Pierce County conviction should even have been included in the first place, but is not relying on that for this appeal.

While Sutton was on bail awaiting trial for his King County crimes, he killed his grandfather. After his conviction in King Country, but prior to sentencing, Sutton pleaded guilty to the now vacated felony murder charge. In Pierce County, Sutton received a sentence in the low end of the standard range with a finding that the King Country first degree kidnapping and first degree child molestation charges constituted the same criminal conduct and should be scored as one offense. The King Country Superior Court then sentenced Sutton to an exceptional sentence ordering that the sentences be served consecutively.

There is no authority to delay sentencing for a defendant on the chance that he might be convicted of a crime. Nor is the fact that the defendant

[4] In re Personal Restraint of Goodwin, 146 Wn.2d 861, 866-67, 50 P.3d 618 (2002); see also State v. Klump, 80 Wn. App. 391, 396-97, 909 P.2d 317 (1996) (holding that even where a sentence was valid at the time of it was entered, it becomes invalid on its face where the underlying conviction was invalidated).

previously pleaded guilty to a now vacated conviction sufficient to delay sentencing. One can not plead guilty to a non-existent crime.[5] The fact that a defendant is awaiting trial on charges cannot be utilized to delay imposition of a correct sentence.

The sentence that was imposed on Sutton was facially invalid and needs to be corrected. This court has held that it "[can]not countenance a prosecutor's action of deliberately scheduling sentencing hearings for a defendant's multiple convictions in such a way as to avoid the presumption of concurrent sentences . . . ."[6] Thus, we cannot countenance the State's delay of correcting an invalid sentence on the possibility of a future conviction.

We grant Sutton's personal restraint petition, vacate his sentence, and remand his case for resentencing using a correct offender score.

Grosse, J

WE CONCUR:

Schindler, ACJ Ellington, J

[5] In re Personal Restraint of Hinton, 152 Wn.2d 853, 860-861, 100 P.3d 801 (2004) (the fact that some petitioners pleaded guilty to the crime which was vacated was immaterial as one cannot plead guilty to a non-existent crime).
[6] State v. Moore, 63 Wn. App. 466, 470-71, 820 P.2d 59 (1991).